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MEMORANDUM

TO: Nevada Advisory Commission on the Administration of Justice
FROM: Brett Kandt, NVPAC Executive Director
DATE: December 17, 2008
RE: Proposed Legislation for the Preservation of Biological Evidence

As requested by the Commission, further discussions have occurred on possible legislation for the preservation of biological evidence first proposed in my August 4 memorandum. Based upon those discussions, I submit the following revised draft for consideration, which broadens the preservation requirement beyond the initial proposal to any identified biological evidence secured in connection with the criminal case:

XXX.XXX Preservation of Biological Evidence.

1. Upon the conviction of a defendant for homicide or for any **felony** sexual offense, any biological evidence ~~used in~~ **secured in connection with** the criminal case shall be preserved for the period of time the person convicted remains incarcerated or until the sentence is carried out.

2. ~~Upon the motion of a person convicted of homicide or of any sexual offense, the court may order the preservation of any other specifically identified biological evidence, not otherwise subject to preservation under subsection (1), for the period of time the person convicted remains incarcerated or until the sentence is carried out.~~

3. For purposes of this section, the term 'biological evidence' means semen, blood, saliva, hair, skin tissue, or other identified biological material removed from physical evidence.

4. The requirements of this section shall apply to any government agency that may be in possession of biological evidence.

5. Biological evidence subject to the requirements of this section may be consumed for testing upon notice to the person convicted.

5. Government agencies may establish procedures for retaining probative samples of biological evidence subject to the requirements of this section and disposing of bulk evidence that do not affect the suitability of the probative sample for testing.

6. Nothing in this section shall limit government agencies from establishing procedures for the retention, preservation and disposal of biological evidence secured in connection with other criminal

Advisory Commission on Admin. of Justice
Exhibit F pg 1 of 3 Date: Dec. 17, 2008
Submitted by: KANDT

Although some parties may prefer extending the preservation requirement to all physical evidence that might potentially contain biological evidence, this would have a significant fiscal impact upon the crime labs and other agencies retaining evidence. Furthermore, my review of other federal and state statutes indicates that of the 39 jurisdictions with automatic or qualified preservation of evidence statutes, 32 limit the requirement to the preservation of identified biological evidence, 6 limit the requirement to physical evidence containing biological evidence, and only Arkansas requires the preservation of physical evidence without limitation.¹

32 jurisdictions limit the requirement to the preservation of identified biological evidence:

Automatic preservation statutes (22):

U.S. - Justice for All Act (H.R. 5107), codified at 18 U.S.C. § 3600A

Arizona - Ariz. Rev. Stat. § 13-4221 (2008)

California - Cal. Penal Code § 1417.9 (2005)

Connecticut - Conn. Gen. Stat. § 54-102jj (2004)

District of Columbia - D.C. Code Ann. § 22-4134 (2004)

Florida - Fla. Stat. ch. 925.11(4) (2005)

Iowa - Iowa Code § 81.10(10) (2005)

Kentucky - Ky. Rev. Stat. Ann. § 524.140 (2004)

Maryland - Md. Code Ann., Crim. Pro § 8-201(i) (2004)

Michigan - Mich. Stat. Ann. § 770.16(11) (West 2005)

Minnesota - Minn. Stat. Ann. § 590.10 (West 2005)

Missouri - Mo. Ann. Stat. § 650.056 (2004)

Montana - Mont. Code Ann. § 46-21-111 (2004)

Nebraska - Neb. Rev. Stat. Ann. § 29-4125(1) (2005)

New Hampshire - N.H. Rev. Stat. Ann. §651-D:3 (2004)

New Mexico - N. M. Stat. Ann. § 31-1A-2 (2004)

North Carolina - N.C. Gen. Stat. § 15A-268(a) (2004)

Oklahoma - Okla. Stat. Ann. tit. 22, § 1372.A (2004)

Rhode Island - R.I. Gen. Laws § 10-9.1-11 (2005)

Texas - Tex. Code Crim. Proc. Ann. art. 38.43 (2005)

Virginia - Va. Code Ann. § 19.2-270.4:1 (2005)

Wisconsin - Wis. Stat. Ann. §§ 165.81(3)(b), 757.54(b), 968.205(2), 978.08(3)(b)(2) (2003)

Qualified preservation statutes (10):

Indiana - Ind. Code Ann. § 35-38-7-14(2) (2004)

Kansas - Kan. Stat. Ann. § 21-2512 (2005)

Maine - Me. Rev. Stat. Ann. tit. 15, § 2138(14) (2005)

Nevada - Nev. Rev. Stat. § 176.0918(3) (2004)

Ohio - Ohio Rev. Code Ann. § 2953.81 (2005)

Pennsylvania - 42 Pa. Cons. Stat. Ann. § 9543.1 (2005)

Tennessee - Tenn. Code Ann. § 40-30-309 (2004)

Utah - Utah Code Ann. § 78-35a-301 (2005)

Washington - Wash. Rev. Ann. Code § 10.73.170(6) (2005)

Wyoming - Wyo. Stat. § 7-12-302 (2008)

¹ Even the Innocence Project model statute focuses on the preservation of biological evidence or specifically-identified physical evidence "likely to contain biological material."

6 jurisdictions limit the requirement to physical evidence containing biological evidence:

Colorado - Colo. Rev. Stat. § 18-1-1102 (2008) requires the automatic preservation of all "reasonable and relevant evidence that may contain DNA that is collected in relation to the conviction" upon conviction for certain offenses.

Georgia - Ga. Code Ann. § 17-5-56 (2005) requires the automatic preservation of all evidence that "may contain" biological evidence upon conviction for certain offenses.

Hawaii - Haw. Rev. Stat. § 844D-126 (2005) requires the automatic preservation of all evidence that "may contain" biological evidence upon conviction for certain offenses.

Illinois - 725 Ill. Comp. Stat. Ann. 5/116-4(2005) requires the automatic preservation of all evidence that "is reasonable likely to contain" biological evidence upon conviction for certain offenses.

Louisiana - La. Code Crim. Proc. Ann. art. 926.1.H(4) (West 2005) requires the automatic preservation of all evidence that "is known to contain" biological material upon conviction for certain offenses.

South Carolina - S.C. Code Ann. § 17-28-70 (2008) requires the qualified preservation of physical evidence and biological material related to a defendant's post-conviction application for DNA testing.

Only Arkansas requires the automatic preservation of all physical evidence (without limitation) upon conviction for certain offenses:

Arkansas - Ark. Code Ann. § 12-12-104 (2005)

This revised proposal, developed in further consultation with the Clark County and Washoe County Crime Labs, would provide for the automatic preservation of biological evidence in homicides and felony sexual offenses without significant fiscal implications. In addition, subsection 5 of the revised proposal provides for the disposal of bulk evidence without compromising the preservation of identified biological evidence. Finally, subsection 6 of the revised proposal provides that government agencies may establish procedures for the retention, preservation and disposal of biological evidence secured in connection with other criminal cases.